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Supreme Court of the United States

October Term 1951
No. 92

GEORGE B. THORP,

Petitioner,

vs.

THE BOARD OF TRUSTEES OF SCHOOLS FOR INDUSTRIAL EDUCATION—NEWARK COLLEGE OF ENGINEERING.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

The question involved is the constitutional sufficiency of Chapter 23 of the Session Laws of 1949 of the State of New Jersey, which amends Section 18:13-9.1 and Section 18:13-9.2 of the Revised Statutes of New Jersey to provide that every applicant for a license to teach or supervise in the public schools of this State, as a condition prerequisite to the issuance of a certificate to that end, and every professor, instructor, teacher or person employed in any teaching capacity who shall thereafter be employed by, or in, any college, university, teachers college, or other school in New Jersey supported in whole or in part by public funds, directly or through contract or otherwise with the State Board of Education, before entering upon the dis-

charge of his duties, shall subscribe to the oath of allegiance and office prescribed by Section 41:1-3 of the Revised Statutes of New Jersey as amended by Chapter 22 of the Session Laws of 1949 of New Jersey. The oath is as follows:

> "I, ..., do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of New Jersey, and that I will faithfully discharge the duties of ....., according to the best of my ability.
>
> "I do further solemnly swear (or affirm) that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of this State and to the Governments established in the United States and in this State, under the authority of the people; and will defend them against all enemies, foreign and domestic; that I do not believe in, advocate or advise the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in the Government established in the United States or in this State, and that I am not a member of or affiliated with any organization, association, party, group or combination of persons, which approves, advocates, advises or practices the use of force, or violence, or other unlawful or unconstitutional means, to overthrow or make any change in either of the Governments so established; and that I am not bound by any allegiance to any foreign prince, potentate, state or sovereignty whatever. So help me God."

Petitioner was employed by the respondent as a special lecturer in mechanical engineering at its Newark College of Engineering for the spring semester beginning February 1, 1950 and concluding the following June 15, 1950. The total compensation was $1,800 payable in equal semi-

monthly payments beginning February 15, 1950 and terminating June 15, 1950 (R. 6, 7). On February 17, 1950, after four days of teaching (R. 5), the respondent requested petitioner to take and subscribe the foregoing oath. One week later petitioner declined in writing upon the ground that it infringed upon the rights of private citizens as guaranteed by the Federal and State constitutions (R. 7, 8). On March 9th following, his teaching employment was for that reason terminated by respondent although he was retained in a non-teaching capacity by the respondent for the remainder of his contract term and at the same salary (R. 8, 9).

The Newark College of Engineering is under the management and control of the respondent, but is supported wholly or in part by public funds, according to an arrangement made with the State Board of Education. The respondent trustees constitute a body corporate under Chapter 164 of the Session Laws of 1881, R. S. 18:15-17 *et seq.*

The action of the trustees was sustained on appeal by the State Commissioner of Education and the State Board of Education. Petitioner appealed to the Appellate Division of the Superior Court of New Jersey and said appeal was certified to the Supreme Court of New Jersey on December 15, 1950 (R. 1). The Supreme Court of New Jersey affirmed the judgment of the State Board of Education and it is this judgment which the petition for certiorari herein seeks to review. The opinion of the Supreme Court of New Jersey is printed in the Transcript of Record (R. 15-27).

Questions Presented

1. Whether the question involved is moot and should be reviewed by this Court?

2. Whether a substantial Federal question has been raised which has not been passed upon by this Court?

Reasons for Denying the Writ

1. The petitioner was employed for a specified period (February 1, 1950 to June 15, 1950) for a total compensation of $1,800. He was retained in a non-teaching capacity for the same term and at the same salary. He demands in his petition to the Commissioner of Education of the State of New Jersey reinstatement under the contract of employment (R. 4). Since the term of employment has expired such a judgment could not be entered. Since he was retained for the term of the contract and at the same salary by the respondent, he is not entitled to monetary damage. Any judgment, therefore, with respect to the employment would be of no value.

2. There is no Federal question involved herein which has not been previously passed upon by this Court in prior cases. As a result, no substantial Federal question is presented over which this Court should take jurisdiction.

ARGUMENT

POINT I

The petition should be denied because the question has become moot.

The petitioner was employed by the respondent, in a temporary position, as a special lecturer in the Newark College of Engineering for the spring semester beginning February 1, 1950 and concluding June 15, 1950. The total compensation under the employment was $1,800 payable semi-monthly beginning February 15, 1950 and terminating June 15, 1950 (R. 6, 7). The petitioner was retained in a non-teaching capacity for the employment term and at the same salary after he refused to subscribe to the oath (R. 8, 9). The term of employment, which was purely temporary, and the conditions of employment have long since expired or been completed. Petitioner in his petition to the Commissioner of Education prayed that he be restored to his teaching position. Since the term of employment has long since expired no such judgment could be rendered now. In addition, since the contract has been executed, in that he was retained in a non-teaching capacity for the remainder of the term of employment and at the same salary, the question has become moot and affirmative relief is neither available nor effective. The thing sought to be prevented has been done and cannot be undone by an order of this Court, or of the court below. *Chesapeake Western Ry. et al.* v. *Jardine*, 8 F. 2nd 794; certiorari denied, *Town of Bridgewater, Va.* v. *Jardine*, 270 U. S. 653, 46 S. Ct. 352; 70 L. Ed. 782.

POINT II

There is no substantial Federal question involved herein which has not been passed upon by this Court in prior decisions.

The petitioner argues that the oath in question is a prohibition against belief and that beliefs are in effect inviolate. The same argument was raised in the case of *American Communications Assoc.* v. *Douds*, 339 U. S. 382, 70 S. Ct. 674, 94 L. Ed. 925. In that case requirements of a somewhat similar oath by officers of labor unions, which was more specific and even broader in its term than the one now under discussion, was sustained. It was held sustainable as to persons and organizations who believe in violent overthrow of the Government as an objective and not merely as a prophecy. This case is fully discussed in the opinion of the Supreme Court of New Jersey (R. 15-27).

In the case of *Garner* v. *Board of Public Works of the City of Los Angeles*, 71 S. Ct. 909 (decided June 4, 1951), a similar question was also involved. This Court in that case sustained the provisions of a statute amending the charter of the City of Los Angeles which provided that no person could hold or retain or be eligible for any public office or employment in the service of the City of Los Angeles who has within five years prior to the effective date of the act advised, advocated or taught or who may after the statute became effective advise, advocate or teach or become a member or affiliated with any group, society, association, organization or party which advises, advocates or teaches the overthrow by force or violence of the Government of the United States or the State of California. The City of Los Angeles passed an ordinance requiring every person who held an office or position in the service of the City to take an oath that such person would not advise, advocate or teach the overthrow by force, violence or other

unlawful means of the Government of the United States or the State of California and that such person is not now and has not been a member of or affiliated with any group, society, association, organization or party which so advises, advocates or teaches and further that such person will not, while in the service of the City, become a member of or become affiliated with any such group, society, association, organization or party. The Court sustained the provisions of the oath required by the ordinance and also the further affidavit required.

In the case of *Gerende* v. *Board of Sup'rs. of Elections*, 71 S. Ct. 565 (decided April 12, 1951), a state law requiring an affidavit in order to secure a place on a ballot for municipal elections in the City of Baltimore was sustained. That case also involved an oath to the effect that candidates were not engaged in an attempt to overthrow the Government by force and violence nor was such person a member of an organization engaged in such an attempt.

It cannot be denied that a state has the right to keep out of its employ those who seek to overthrow the Government by force or violence or who are members of an organization engaged in such an endeavor. There is no constitutional right to work for the violent overthrow of the Government established by the Constitution and it is even more absurd to contend, as the petitioner in effect seems to do, that anyone has an enforceable right to occupy a teaching position of public trust and at the same time a protected right or privilege to scheme, conspire and work for the violent and forcible overthrow of the Government. The First Amendment is not intended to protect the teaching or advocacy of sabotage or to protect persons who teach or advocate the overthrow of Government by force and violence. The Federal Constitution was adopted to establish and preserve the Government and not to serve as a refuge or shield for those who seek to destroy it. Unless

a state may act to preserve its existence the basic freedoms now guaranteed by the Constitution would disappear.

The right of a government to secure its own protection is exemplified in many cases. *United Public Workers* v. *Mitchell*, 330 U. S. 75, 67 S. Ct. 556, 91 L. Ed. 754; *Re Summers*, 325 U. S. 561, 65 S. Ct. 1307, 89 L. Ed. 1795; *Hamilton* v. *Regents of University of California*, 293 U. S. 245, 55 S. Ct. 197, 79 L. Ed. 343; *Gitlow* v. *N. Y.*, 268 U. S. 652, 69 L. Ed. 1138; *Witney* v. *California*, 274 U. S. 357, 71 L. Ed. 1095; *Prince* v. *Commonwealth of Massachusetts*, 321 U. S. 158, 64 S. Ct. 438, 88 L. Ed. 645.

The respondent contends that there is no substantial question raised in the petition herein and that all of the questions which are raised herein have been decided adversely to the contentions of petitioner in similar cases in this Court.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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